Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

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**IN RE**

**GEANA J. DUNKIN**

**AND**

**DAVID L. SMITH**

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# PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

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DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

ATTORNEY FOR PETITIONERS

## QUESTIONS PRESENTED FOR REVIEW

Whether the Clerk of the Supreme Court may refuse to receive or file a petition for a writ of certiorari on the ground that the Supreme Court lacks jurisdiction under 28 U.S.C. § 1254(1).

Whether the Clerk of the Supreme Court may refuse to receive or file an application addressed to an individual Justice on the ground that an individual Justice has no authority to review an order entered by the full Court.

## PARTIES

Geana J. Dunkin, Petitioner

David L. Smith, Petitioner

William K. Suter, Clerk of the Supreme Court of the United States, Respondent

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**PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION**

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Geana J. Dunkin and her attorney, David L. Smith, hereby file the following Petition for a Writ of Mandamus or Prohibition:

**ACTIONS BELOW**

Reference is hereby made to the letters from the Clerk of the Supreme Court of the United States, William K. Suter, refusing to receive or file Ms. Dunkin's and her attorney's (May 18, 1994) Petition for a Writ of Certiorari

to the United States Court of Appeals for the Tenth Circuit; and refusing to receive or file Ms. Dunkin's and her attorney's (July 6, 1994, July 15, 1994, and July 28, 1994) applications addressed to the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the United States Court of Appeals for the Tenth Circuit.

**JURISDICTION**

On June 2, 1994, the Clerk of the Supreme Court refused to receive or file Ms. Dunkin's and her attorney's (May 18, 1994) Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on the ground that the Supreme Court lacks jurisdiction under 28 U.S.C. § 1254(1). The Clerk subsequently refused to receive or file Ms. Dunkin's and her attorney's applications addressed

to the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the United States Court of Appeals for the Tenth Circuit, on the ground that an individual Justice has no authority to review an order entered by the full Court. The statutory provision believed to confer on the Supreme Court jurisdiction to review the Clerk's refusals by writ of mandamus or prohibition is 28 U.S.C. § 1651(a).

**STATUTORY PROVISION INVOLVED**

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

## STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

Ms. Dunkin is a 47-year-old female citizen of the United States who was employed by Louisiana-Pacific Corporation from May 28, 1985 through May 17, 1991. During this period, Ms. Dunkin performed her job in an outstanding manner, as evidenced by the performance reviews of her supervisors, and by her promotion to the position of Personnel Director of the plants at Kremmling and Walden, Colorado, and Saratoga, Wyoming. Both before and after Ms. Dunkin's promotion, numerous comments were made by James Beldin, Dan Dilworth and Douglas Eddins demonstrating a bias against over-forty, female and/or disabled employees, and against employees who filed worker's compensation claims.

Between October of 1990 and February 4, 1991, Ms. Dunkin suffered

approximately twelve asthma attacks at work, and began receiving disability benefits in accordance with company policy. On February 25, 1991, Ms. Dunkin's initial treating physician, Dr. Gloria Zibilich, filled out and returned to the employer the form applicable to an employee with an occupational illness or injury. On February 28, 1991, Ms. Dunkin's attorney filed a worker's compensation claim on her behalf with the Colorado Department of Labor because of her employer's refusal to do so. On March 14, 1991, Carol Jacobson, the Salaried Payroll Administrator at Hayden Lake, Idaho wrote Ms. Dunkin a letter threatening to "discontinue" her disability benefits if she did not have her treating physician fill out and return the forms applicable to an employee with a nonoccupational illness

or injury. On March 27, 1991, Ms. Dunkin wrote back to Ms. Jacobson advising her that the forms she had sent were not appropriate to Ms. Dunkin's circumstances, which involved an occupational illness caused by chemicals in the work environment; and offering to give the forms applicable to an employee with an occupational illness or injury to her doctors for completion if Ms. Jacobson would send those forms to her. On April 2, 1991, Ms. Jacobson wrote back to Ms. Dunkin terminating her disability benefits effective April 1, 1991, in violation of company policy requiring continuation of salaried employee disability benefits until worker's compensation benefits become available; and enclosing the forms applicable to an employee with an occupational illness or injury.

In stark contrast to this situation, none of the more than 258 under-40 male employees at the Kremmling, Montrose or Walden, Colorado plants receiving disability benefits or worker's compensation benefits in 1988, 1989, 1990 or 1991 had their benefits terminated in violation of company policy. On May 17, 1991, Ms. Dunkin wrote a letter to Mr. Beldin resigning from her employment because of her employers' illegal age, sex and/or handicap discrimination and/or retaliation against her, and because of their retaliation against her for filing and pursuing a worker's compensation claim.

With reasonable accommodation, Ms. Dunkin could have continued to perform most of her job duties as Personnel Director in spite of her handicap; but no good faith effort was made to move her to

a location that did not require her to be exposed to formaldehyde, MDI and other chemicals. Ms. Dunkin could not continue to survive economically after her disability benefits were terminated; and she was compelled to resign from her employment in order to collect the contributions made on her behalf to the company retirement program.

After Ms. Dunkin resigned from her employment, most of her job duties as Personnel Director were assigned to two males: Don Meyers at the Kremmling plant, and David Johnson at the Walden plant. Juan Maestas, the male Personnel Director at the Montrose plant, was also assigned some of Ms. Dunkin's job duties.

On May 29, 1991, Mr. Beldin wrote Ms. Dunkin a letter purporting to offer to reinstate her and to accommodate her handicap; but no concrete proposal was

made to move her to a location that did not require her to be exposed to formaldehyde, MDI and other chemicals. Mr. Beldin's letter to Ms. Dunkin was nothing more than an attempted coverup of her employers' discriminatory and retaliatory motive to make working conditions so difficult that a reasonable person in Ms. Dunkin's position would feel compelled to resign.

On May 31, 1991, Ms. Dunkin wrote Mr. Beldin a second letter of resignation, identical to the first, in response to his insincere offer and attempted coverup. Mr. Maestas later told Ms. Dunkin that Mr. Beldin was "angry beyond description" at her for pursuing her worker's compensation claim, and that Mr. Beldin said that he would "never again hire a female personnel director."

B. PROCEDURAL BACKGROUND PRIOR TO THE TENTH CIRCUIT DISCIPLINARY PANEL'S (NOVEMBER 29, 1993) DISCIPLINARY ORDER SUSPENDING MS. DUNKIN'S ATTORNEY FROM THE PRACTICE OF LAW IN THE TENTH CIRCUIT UNTIL ALL SANCTIONS IMPOSED AGAINST HIM BY THE TENTH CIRCUIT AND THE DISTRICT COURT ARE PAID.

On February 7, 1992, Ms. Dunkin filed suit in the United States District Court for the District of Colorado, United States District Judge Edward W. Nottingham presiding. Ms. Dunkin's complaint charged defendants Louisiana-Pacific Corporation, James Beldin, Dan Dilworth, and Douglas Eddins with intentional age discrimination and retaliation under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; intentional sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a;

intentional age and sex discrimination and retaliation under the Colorado Antidiscrimination Act of 1957, C.R.S. §§ 24-34-301 et seq.; and intentional retaliation for filing and pursuing a worker's compensation claim under Colorado common law. Subject matter jurisdiction of the District Court was based on 28 U.S.C. §§ 1331, 1343 and 1367.

On July 9, 1992, Judge Nottingham held a hearing and granted the motions for protective orders filed by the defendants;[1] imposed sanctions (including

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[1]Judge Nottingham granted defendants' motions for protective orders even though they failed to show "good cause" for a protective order under Fed. R. Civ. P. 26(c). See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Specifically, defendants failed to show that the documents and information sought to be protected were subject to any confidential information privilege.

harsh verbal reprimands) against Ms. Dunkin and/or her attorney, David L. Smith (a sole practitioner in Denver, Colorado), for refusing to sign the confidentiality agreement proposed by defendants with respect to virtually all of the documents to be produced to Ms. Dunkin in the case;[2] and required Ms. Dunkin to obtain approval for her depositions and other discovery requests from a United States Magistrate Judge as a condition precedent to conducting any discovery in the case.[3] In connection

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[2]The confidentiality agreement proposed by defendants was exceedingly broad in scope, covering virtually every document to be produced to Ms. Dunkin in the case, as well as all information obtained from such documents; and requiring her to follow burdensome and expensive procedures for use of the documents and information at depositions or at trial.

[3]Under the stipulated scheduling and discovery order signed by the attorneys for the parties and by Judge Nottingham,

with the sanctions imposed against Ms. Dunkin and/or her attorney, Judge Nottingham ordered the defendants to file their applications for attorney fees by July 13, 1992, and set a hearing for July 16, 1992, at 6 a.m., to resolve any disputed matters relating to the applications for attorney fees.

On July 16, 1992, Judge Nottingham held a hearing on defendants' applications for attorney fees, and awarded attorney fees of $4,060.00 against Ms. Dunkin's attorney only; required him to pay this amount to defendants on or before July 27, 1992; and denied his request for a stay of execution on the award of attorney fees

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and entered by Judge Nottingham on May 28, 1992, discovery, including the depositions of the parties and more than 38 witnesses, was to be completed by September 25, 1992.

pending appeal. Judge Nottingham then issued a written order awarding "an additional fee of $481.25 for defense counsel's actual attendance at the hearing on Thursday, July 16, 1992 ($175 per hour x 2.75 hours actual hearing time)," as well as a written order "protecting confidential information," and a written special order of reference to United States Magistrate Judge imposing additional burdensome and illegal conditions on Ms. Dunkin's discovery in the case. Throughout Judge Nottingham's verbal and written orders, Ms. Dunkin's attorney was attacked, vilified and reprimanded in the harshest conceivable terms. Ms. Dunkin and her attorney subsequently appealed Judge Nottingham's (July 9 and July 16, 1992) orders to the United States Court of Appeals for the Tenth Circuit.

On December 3, 1992, Judge Nottingham held a hearing and denied Ms. Dunkin's motion for reconsideration of the ruling made by United States Magistrate Judge Bruce D. Pringle on October 29, 1992, and imposed sanctions (including harsh verbal reprimands) against Ms. Dunkin and/or her attorney under Rule 602C of the Local Rules of Practice of the United States District Court for the District of Colorado and/or Fed. R. Civ. P. 37 for filing the motion for reconsideration. In his (October 29, 1992) ruling, Magistrate Judge Pringle sustained the objection of defendants' attorney, Cecil R. Hedger, to deposition questions asked by Ms. Dunkin's attorney relating to discrimination against Hispanic employees of defendant Louisiana-Pacific Corporation. At the (December 3, 1992) hearing, Judge

Nottingham acknowledged that discrimination against Hispanic employees of defendant Louisiana-Pacific Corporation was relevant to the subject matter of the pending action under Fed. R. Civ. P. 26(b); but found and concluded that Magistrate Judge Pringle's (October 29, 1992) ruling was nevertheless not "clearly erroneous" or "contrary to law" under Local Rule 602C, which included a provision requiring attorney fees to be assessed against the losing party on a motion for reconsideration of a magistrate's ruling. When Ms. Dunkin's attorney argued that the attorney fee provision of Local Rule 602C was beyond the scope of authority granted by 28 U.S.C. § 636, Judge Nottingham indicated that Fed. R. Civ. P. 37 was an alternative basis for assessing attorney fees in this situation, and ordered the

defendants to file their applications for attorney fees and costs against Ms. Dunkin's attorney only by December 8, 1992.

On December 10, 1992, Judge Nottingham held a hearing on defendants' applications for attorney fees and costs, and awarded attorney fees and costs of $1,870.93 against Ms. Dunkin's attorney for filing and pursuing the motion for reconsideration of Magistrate Judge Pringle's (October 29, 1992) ruling; required him to pay this amount to defendants on or before December 16, 1992; and denied his request for a stay of execution on the award of attorney fees and costs pending appeal. Throughout Judge Nottingham's orders, Ms. Dunkin's attorney was attacked, vilified and reprimanded in the harshest conceivable terms. Ms. Dunkin and her

attorney subsequently appealed Judge Nottingham's (December 3 and December 10, 1992) orders to the Tenth Circuit.

On February 11, 1993, the Tenth Circuit issued its unpublished order dismissing for lack of jurisdiction Ms. Dunkin's and her attorney's appeals of Judge Nottingham's (July 9, July 16, December 3 and December 10, 1992) sanctions orders; imposing additional monetary sanctions against Ms. Dunkin's attorney only for filing alleged frivolous appeals of Judge Nottingham's sanctions orders; and remanding the case to Judge Nottingham for a determination of reasonable attorney fees for each defendant for defending the alleged frivolous appeals. The Tenth Circuit subsequently denied Ms. Dunkin's and her attorney's petition for rehearing and suggestion for rehearing en banc.

On June 15, 1993, Ms. Dunkin and her attorney filed their Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, arguing that an order sanctioning counsel currently of record is immediately appealable under the collateral order exception to the final judgment rule established by the Supreme Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949). Ms. Dunkin and her attorney also argued that sanctions may not be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law. The Supreme Court subsequently denied Ms. Dunkin's and her attorney's petition for a writ of certiorari.

On July 20, 1993, Judge Nottingham lifted the stay of Ms. Dunkin's case that had been in effect since December 23, 1992, and denied Ms. Dunkin's (December 15, 1992) motion for him to disqualify himself from the case pursuant to 28 U.S.C. § 455(a). In her motion to disqualify Judge Nottingham, Ms. Dunkin argued that "what is apparent from a review of the record in this case is that while no legal or factual basis existed for imposing sanctions against the plaintiff and plaintiff's attorney, Judge Nottingham nevertheless did so over plaintiff's objections, while refusing to impose sanctions against the defendants and defendants' attorney for refusing to obey Judge Nottingham's previous orders to produce . . . the documents requested by the plaintiff, and refusing to permit the plaintiff to take the depositions of

witnesses with knowledge relevant to the case;" that "as the result of this situation, the plaintiff has been deprived of her right to pursue her lawsuit (including her right to defend against defendants' promised summary judgment motion) in accordance with the intent of Congress in passing the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., as amended by the Civil Rights Act of 1991;" that "Judge Nottingham has exceeded his jurisdiction and abused his power and discretion, in violation of Article III and the due process clause of the Fifth Amendment to the United States Constitution, and the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 1;" and that "it is therefore clear that Judge

Nottingham's impartiality might reasonably be questioned in this case." Judge Nottingham denied Ms. Dunkin's motion to disqualify without addressing the merits of the motion or giving any reasons for denying it.

On July 29, 1993, Judge Nottingham held a hearing and addressed the following comments to Ms. Dunkin, who made the following response:

> THE COURT: Now, Ms. Dunkin, let me address you directly. This case is going to be tried and/or disposed of on its merits. I think that you are being very ill served by your attorney, Mr. Smith, and I want to advise you of that on the record. You've chosen this attorney and it's my view that he is not competently representing you.
>
> If you wish to have the Court appoint an attorney or if you wish to retain another attorney, I will permit that. You are entitled to the appointment--well, you're not entitled, but the Court is willing to appoint an attorney under the provisions of Tenth Circuit case law to represent you in this case. It is your choice, and if you choose to

proceed with Mr. Smith, you won't be in a position later on to complain to the Court that your case was not properly tried.

Do you understand that?

MS. DUNKIN: (No audible response.)

THE COURT: I didn't hear you.

MS DUNKIN: Yes.

THE COURT: All right. Court's in recess.

(Whereupon, at 6:37 a.m., the hearing was concluded.)

C. THE TENTH CIRCUIT DISCIPLINARY PANEL'S (NOVEMBER 29, 1993) DISCIPLINARY ORDER SUSPENDING MS. DUNKIN'S ATTORNEY FROM THE PRACTICE OF LAW IN THE TENTH CIRCUIT UNTIL ALL SANCTIONS IMPOSED AGAINST HIM BY THE TENTH CIRCUIT AND THE DISTRICT COURT ARE PAID.

On November 29, 1993, a three-judge disciplinary panel of the Tenth Circuit issued its disciplinary order holding that Ms. Dunkin's attorney had filed frivolous appeals in four civil rights cases (including Dunkin) originally filed

in the United States District Court for the District of Colorado; and suspending him from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid.[4] See In re

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[4]Before issuing its (November 29, 1993) disciplinary order, the Tenth Circuit disciplinary panel denied Ms. Dunkin's attorney's request pursuant to Section 7 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit to be heard in person in defense and in mitigation with respect to the charges being brought against him by the disciplinary panel. (See also Fed. R. App. P. 46, requiring a hearing, if requested, before taking any appropriate disciplinary action against any attorney.) In that request, Ms. Dunkin's attorney said:

> Since [Mr. Smith's] case in defense and in mitigation will require presentation of extensive evidentiary materials, including expert testimony, . . . [Mr. Smith] requests the Disciplinary Panel to vacate the hearing and oral argument set for November 12, 1993, and to hold an evidentiary hearing [emphasis in the original] at some future date after . . . [Mr. Smith]

> has been given the opportunity to prepare his case. Alternatively, . . .[Mr. Smith] requests the Panel to designate a special master for purposes of conducting an evidentiary hearing.

As the result of the disciplinary panel's denial of an evidentiary hearing to Ms. Dunkin's attorney after notice and a reasonable opportunity to prepare his case, he was unable to present expert testimony or otherwise make a proper record on the issue of whether the appeals in the four civil rights cases (including Dunkin) were frivolous; and was unable to present the financial information necessary to show that he is financially unable to pay the more than $50,000.00 in totally unwarranted sanctions imposed against him by the Tenth Circuit and the District Court.

The Tenth Circuit disciplinary panel denied Ms. Dunkin's attorney's request to reconsider whether the appeals in the four civil rights cases were frivolous, holding that "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." [Citations omitted.] However, this holding was contrary to 10th Cir. R. 36.3, which provided that "[u]npublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of

the law of the case, res judicata, or collateral estoppel;" and created an irrebuttable presumption of guilt that deprived Mr. Smith of procedural and substantive due process of law.

The Tenth Circuit disciplinary panel said:

> At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may reapply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

However, since the suspension of Ms. Dunkin's attorney by the disciplinary panel is based, in part, on his alleged misconduct in the District Court for which he has already been severely sanctioned, he is being subjected to multiple excessive punishments for the same conduct, in violation of the double jeopardy provision of the Fifth Amendment to the United States Constitution.

As the further result of the disciplinary order suspending Ms. Dunkin's attorney from the practice of law in the Tenth Circuit, reciprocal discipline proceedings are now pending against him in the United States Court of

Smith, 10 F.3d 723 (10th Cir. 1993). Ms. Dunkin's attorney may apply for

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Appeals for the Federal Circuit, the United States District Court for the District of Colorado and the Colorado Supreme Court. At least three of Ms. Dunkin's attorney's civil rights cases in the United States District Court for the District of Colorado (including Dunkin) have been stayed pending resolution of these proceedings, thus punishing him before he has been convicted of any inappropriate conduct; and interfering with his clients' First Amendment right to access to the federal courts, and with their attorney-client relationship.

The disciplinary panel's disciplinary order is the subject of a separate petition for a writ of certiorari filed with the Supreme Court on March 31, 1994 (No. 93-1547). In his petition, Ms. Dunkin's attorney argues that an attorney may not be disciplined by a circuit court based on the attorney's challenge to that circuit court's view of its interlocutory jurisdiction which is in conflict with that of other circuits; that an attorney may not be suspended by a circuit court until the attorney pays all monetary sanctions assessed against him or her, where the attorney is financially unable to pay those sanctions; and that a circuit court's denial of an evidentiary hearing prior to suspending an attorney constitutes an abuse of discretion or a denial of due process.

reinstatement to the Tenth Circuit Bar "when he can demonstrate that each sanction order of this court and the district court has been satisfied." Id.

D. PROCEDURAL BACKGROUND PRIOR TO THE SUPREME COURT'S (MAY 23, 1994) OPINION IN MCKNIGHT V. GENERAL MOTORS CORPORATION.

On February 17, 1994, Judge Nottingham held a hearing and stayed Ms. Dunkin's case "pending resolution of Mr. Smith's status by the Committee on Conduct;" but did not vacate the March 28, 1994 jury trial date. Judge Nottingham then awarded immediately payable attorney fees of $17,506.50 and costs of $579.33 against Ms. Dunkin's attorney pursuant to the Tenth Circuit's (February 11, 1993) order remanding the case to Judge Nottingham for a determination of reasonable attorney fees for each defendant for defending the

alleged frivolous appeals of his sanctions orders.

On March 4, 1994, Judge Nottingham held a trial preparation conference at which the following colloquy occurred:

> THE COURT: All right, the matter is here for a trial preparation conference.
>
> Mr. Smith, can you give us, without revealing anything that you shouldn't be revealing, give us any guess as to when the matter will be resolved so that we'll know whether you're in or out of this case?
>
> MR. SMITH: No, Your Honor, I have no further information.
>
> THE COURT: Well, I can't continue, you know, to hold that trial date open. What's your position? I mean, you can't continue at this point, can you? You can't even sign a final pretrial order, or you haven't so far.
>
> MR. SMITH: I would ask for permission to sign at this point. There's been no ruling by a court one way or another as to what my status is, and all I have are some allegations.
>
> THE COURT: And you haven't paid any of the money yet; right?

MR. SMITH: You're speaking of the sanctions in this case?

THE COURT: Right. Well, this case or any other case.

MR. SMITH: No, Your Honor, I am unable to pay any sanctions.

THE COURT: All right. This trial is continued.

Mr. Hedger, I'm assuming that Louisiana-Pacific doesn't object to that. I mean, obviously at some point, the work that you've put into it will come to fruition.

MR. HEDGER: Your Honor, Louisiana-Pacific is not going to interpose an objection to the continuance of this matter, but only to note and remind the Court that on July the 29th of 1993, this Court was very direct in a personal conversation with Ms. Dunkin--

THE COURT: Right.

MR. HEDGER: --and advised her of her need to obtain new counsel. We are now in the position, Your Honor, of having certain of our witnesses who are retired, and it's getting difficult to round them up and make schedules. We would be most desirous of working with the Court in terms of setting an appropriate schedule.

I don't know yet, the Court set this matter for a three day trial and Mr. Smith, in his position in the pretrial order that he's now represented after four months he's willing to sign, thinks this case is going to be a five day trial. And there's a couple of other type of housekeeping issues that need to be addressed at some point. It doesn't necessarily have to be today, Your Honor.

THE COURT: All right. The Tenth Circuit was pretty clear. I can't understand what our disciplinary committee is having such a problem with. But they work on their own schedule and they work on a volunteer basis. So the matter is continued and as soon as Mr. Smith's status is resolved, we'll figure out where it goes.

And I intend to brook no further delay, because Ms. Dunkin's been warned clearly. She used to attend these conferences. Where is she, Mr. Smith?

MR. SMITH: She's in school, Your Honor.

THE COURT: I see.

On March 17, 1994, Ms. Dunkin filed her pro se appeal of Judge Nottingham's (February 17, 1994 and March 4, 1994)

orders, arguing that he abused his discretion by staying her civil rights case and vacating the March 28, 1994 jury trial date "pending resolution of Mr. Smith's status by the Committee on Conduct." Appellate jurisdiction of the Tenth Circuit is based on 28 U.S.C. § 1292(a)(1), which provides that courts of appeals shall have jurisdiction of appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions . . . ." The Tenth Circuit has notified the parties that it is considering summary dismissal of this appeal for lack of jurisdiction; and has requested and received briefs from the parties on the jurisdictional issue of "whether the order being appealed is an appealable order."

On May 18, 1994, Ms. Dunkin and her attorney filed their Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, arguing that the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by Judge Nottingham, as to call for an exercise of the Supreme Court's power of supervision. Ms. Dunkin and her attorney said:

> In summary, the Tenth Circuit and Judge Nottingham have imposed immediately payable monetary sanctions of $18,085.83 against Mr. Smith for filing and pursuing alleged frivolous appeals of immediately payable monetary sanctions of $6,412.18 imposed against him by Judge Nottingham. While Mr. Smith's appeals have been deemed "frivolous" because of Tenth Circuit precedent holding that interlocutory sanctions orders are not immediately appealable, a majority of the circuit courts hold that sanctions orders are immediately appealable under the collateral order exception to the final judgment rule set forth in

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3rd Cir. 1985)(leading case); Frazier v. Cast, 771 F.2d 259, 261-62 (7th Cir. 1985)(fee award imposed on attorney is appealable collateral order); TMF Tool Co., Inc. v. Muller, 913 F.2d 1185, 1189 (7th Cir. 1990)(referring to conclusion of sanctions matters as final for appealability purposes); Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990)("A sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order."); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988)("[S]anction orders issued solely against non-party attorneys are immediately appealable"); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 n. 5 (9th Cir. 1987)("An order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon imposition of the sanction."); Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 556 (9th Cir. 1986)(fee award against counsel is immediately appealable), cert. denied, 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); DeSisto College, Inc. v. Line, 888 F.2d 755, 761-63 (11th Cir. 1989), cert.

denied, 495 U.S. 952, 110 S.Ct. 2219, 109 L.Ed.2d 544 (1990)(fee award against counsel appealable); Ortho Pharmaceutical Corp. v. Sona Distributors, 847 F.2d 1512, 1515 (11th Cir. 1988)("When a Rule 11 sanction directs a non-party (jointly and severally with parties to the action or alone) to pay immediately--that is, before entry of final judgment--significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order."); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1172 (D.C. Cir. 1985)(fee award against a former counsel is appealable collateral order).

Since Mr. Smith's appeals of Judge Nottingham's unwarranted sanctions orders would be permitted by a majority of the circuit courts, he is being required to pay monetary sanctions that he is financially unable to pay for filing and pursuing appeals that are not frivolous, thus depriving him of substantive due process of law. These monetary sanctions are being imposed against Mr. Smith in addition to his being suspended from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid, thus subjecting him to multiple excessive punishments for the same conduct. Despite the complete destruction of Mr. Smith's liberty and property interests in his good name,

reputation, honor and integrity, and in his right to practice law and make a living, his request for a pre-suspension evidentiary hearing was denied, thus depriving him of procedural due process of law.

Because of the reciprocal discipline provision of the Local Rules of Practice of the United States District Court for the District of Colorado, the Committee on Conduct has made a recommendation to impose identical and simultaneous discipline against Mr. Smith in the District Court. If this recommendation is adopted by the three-judge disciplinary panel of the District Court, Mr. Smith will be subjected to additional excessive punishment for the same conduct.

Meanwhile, Ms. Dunkin's civil rights case, including her jury trial date, remains stayed "pending resolution of Mr. Smith's status by the Committee on Conduct," a body of volunteer lawyers that has no authority to determine his status. Indefinitely staying Ms. Dunkin's case on this unwarranted basis while interfering inappropriately with the attorney-client relationship between Ms. Dunkin and her attorney demonstrates clearly the bias of Judge Nottingham, who abused his discretion by refusing to disqualify himself from the case pursuant to 28 U.S.C. § 455(a).

> The United States Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by United States District Judge Edward W. Nottingham, as to call for an exercise of the Supreme Court's power of supervision.

E. THE SUPREME COURT'S (MAY 23, 1994) OPINION IN MCKNIGHT V. GENERAL MOTORS CORPORATION.

On May 23, 1994, the Supreme Court issued its opinion in McKnight v. General Motors Corporation, 62 U.S.L.W. 3771 (1994) (per curiam) establishing the following standard for determining when an argument on appeal is frivolous and therefore sanctionable:

> The Court of Appeals correctly rejected petitioner's argument that § 101 [of the Civil Rights Act of 1991, 105 Stat. 1071, 42 U.S.C. § 1981 (1988 ed., Supp. IV)] applies retroactively. See Landgraf v. USI Film Products, 511 U.S. ____ (1994); Rivers v. Roadway Express, Inc., 511 U.S. ____ (1994). However, if the only basis for the order imposing sanctions on petitioner's attorney was that his retroactivity argument

was foreclosed by circuit precedent, the order was not proper. As petitioner noted in his memorandum opposing dismissal of sanctions, this Court had not yet ruled on the application of § 101 to pending cases. Filing an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by this Court. Although, as of September 30, 1992, there was no circuit conflict on the retroactivity question, that question had divided the District Courts and its answer was not so clear as to make petitioner's position frivolous. [Citation omitted.]

F. THE UNWARRANTED REFUSAL BY THE CLERK OF THE SUPREME COURT TO RECEIVE OR FILE MS. DUNKIN'S AND HER ATTORNEY'S (MAY 18, 1994) PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

On June 2, 1994, the Chief Deputy Clerk of the Supreme Court mailed the following letter to Ms. Dunkin's attorney:

> Your petition for a writ of certiorari mailed May 18, 1994 from Denver was received May 20, 1994 and must be returned since it does not appear that an appeal from the February 17, 1994 order of the

United States District Court has been taken to the United States Court of Appeals for the Tenth Circuit. In order for this Court to have jurisdiction over the case, it must either be in the United States Court of Appeals or be decided by the United States Court of Appeals. See 28 U.S.C. 1254(1). The Court has no authority to review orders of an United States District Court on writ of certiorari absent the case being in the Court of Appeals.

Furthermore, this Court has once reviewed this judgment of the Tenth Circuit, their case Nos. 92-1230 and 92-1381, in your petition for a writ of certiorari No. 92-1994 which was denied by this Court by order dated October 4, 1993.

Your check in the amount of $300.00 is returned as well.

On June 9, 1994, Ms. Dunkin's attorney sent by Federal Express the following letter to the Clerk of the Supreme Court:

On May 18, 1994, I filed (by first-class mail) 40 copies of a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, with appendix, and requested docketing of same in the United States Supreme Court. The petition invokes the

Supreme Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 1651(a).

On June 2, 1994, your Chief Deputy Clerk, Francis J. Lorson, returned the petition to me, along with a letter stating that the Supreme Court has no authority to review the petition. My check for the $300.00 filing fee was also returned.

I am returning the filed petition to you for docketing. I am also returning my check for the $300.00 filing fee. Any jurisdictional issues will be decided by the Supreme Court.

On June 20, 1994, the Chief Deputy Clerk of the Supreme Court mailed the following letter to Ms. Dunkin's attorney:

The Court today entered the following order in the above-entitled case:

"The motion to direct the Clerk to file a petition for a writ of certiorari is denied."

Your check in the amount of $300.00 is herewith returned.

G. THE UNWARRANTED REFUSAL BY THE CLERK OF THE SUPREME COURT TO RECEIVE OR FILE MS. DUNKIN'S AND HER ATTORNEY'S APPLICATIONS TO THE HONORABLE RUTH BADER GINSBURG, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

On July 6, 1994, Ms. Dunkin and her attorney filed their Application for Review of Order Denying Motion to Direct the Clerk to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. Ms. Dunkin and her attorney requested the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the United States Court of Appeals for the Tenth Circuit, to grant their application, and such other and further relief as may be just under the circumstances. Ms. Dunkin and her attorney specifically requested leave to

supplement their (May 18, 1994) Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to the extent necessary to raise the issue that the orders imposing monetary sanctions against Ms. Dunkin's attorney have been rendered moot by the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order suspending Ms. Dunkin's attorney from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid; and by the Supreme Court's (May 23, 1994) opinion in McKnight.

On July 11, 1994, an Assistant Clerk of the Supreme Court mailed the following letter to Ms. Dunkin's attorney:

> The full Court on June 20, 1994 denied your motion to direct the Clerk to file a petition for a writ

> of certiorari. A single Justice has no authority to review an order entered by the full Court; therefore, your papers are herewith returned.

On July 15, 1994, Ms. Dunkin and her attorney filed their Application to Direct the Clerk to File an Application for Review of Order Denying Motion to Direct the Clerk to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. Ms. Dunkin and her attorney requested the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the United States Court of Appeals for the Tenth Circuit, to grant their application, and such other and further relief as may be just under the circumstances. Ms. Dunkin and her attorney again specifically requested leave to supplement their (May 18, 1994)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to the extent necessary to raise the issue that the orders imposing monetary sanctions against Ms. Dunkin's attorney have been rendered moot by the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order suspending Ms. Dunkin's attorney from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid; and by the Supreme Court's (May 23, 1994) opinion in McKnight.

On July 20, 1994, the Chief Deputy Clerk of the Supreme Court mailed the following letter to Ms. Dunkin's attorney:

> Your application to Justice Ginsburg to review the order of Court entered June 20, 1994 was

> received July 18, 1994 and must be returned since an individual Justice has no authority to review an order entered by the full Court.

On July 28, 1994, Ms. Dunkin and her attorney attempted to refile their Application to Direct the Clerk to File an Application for Review of Order Denying Motion to Direct the Clerk to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On August 1, 1994, the Chief Deputy Clerk of the Supreme Court mailed the following letter to Ms. Dunkin's attorney:

> Your application to direct the Clerk to file an "application for review of order denying motion to direct the Clerk to file a petition for a writ of certiorari" was received again July 29, 1994 and is returned for the reasons set forth in my prior letter.

## REASONS FOR GRANTING THE WRIT

While the Clerk of the Supreme Court did not have the authority to refuse to receive or file Ms. Dunkin's and her attorney's (May 18, 1994) Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, even if he did, the assumption that the case is not "in the United States Court of Appeals," as required by 28 U.S.C. § 1254(1), is incorrect for two reasons. First, under the procedure for imposing appellate sanctions established by the Tenth Circuit, Judge Nottingham was acting on behalf of the Tenth Circuit on February 17, 1994, when he awarded immediately payable attorney fees of $17,506.50 and costs of $579.33 against Mr. Smith for filing alleged frivolous appeals of his sanctions orders. See Braley v. Campbell, 832 F.2d 1504 (10th

Cir. 1987). Second, the case is "in the United States Court of Appeals" by virtue of Ms. Dunkin's pro se appeal of Judge Nottingham's (February 17, 1994 and March 4, 1994) orders staying her case and vacating the jury trial date.

Nor is the Clerk's assumption that the Supreme Court has reviewed the (February 17, 1994 and March 4, 1994) orders a correct one. Neither of these orders had even been issued on October 4, 1993, when the Supreme Court denied the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by Ms. Dunkin and her attorney on June 15, 1993. Accordingly, this is clearly not a case where consecutive petitions for a writ of certiorari have been filed by Ms. Dunkin and her attorney in violation of Supreme Court Rule 44.4.

Finally, the Clerk's refusal to receive or file Ms. Dunkin's and her attorney's (July 6, 1994, July 15, 1994, and July 28, 1994) applications addressed to Associate Justice Ginsburg is an unwarranted interference with Ms. Dunkin's and her attorney's First Amendment right to access to the Supreme Court. If, as alleged in the Clerk's letters, "a single Justice has no authority to review an order entered by the full Court," then Ms. Dunkin's and her attorney's applications should have been referred to the full Court for review. The Clerk had no authority to return Ms. Dunkin's and her attorney's applications without following the procedure set forth in Supreme Court Rule 22.

More fundamentally, the orders imposing monetary sanctions against Ms.

Dunkin's attorney have been rendered moot by the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order suspending Ms. Dunkin's attorney from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid. Under the referenced disciplinary order, Ms. Dunkin's attorney is suspended from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid. It follows, then, that Ms. Dunkin's attorney is not required to pay the sanctions imposed against him by the Tenth Circuit and the District Court if he exercises his "option" of remaining suspended. Since Ms. Dunkin's attorney is financially unable to pay the more than $50,000 in totally unwarranted sanctions

imposed against him by the Tenth Circuit and the District Court, he has been forced to exercise his "option" of remaining suspended from the practice of law in the Tenth Circuit since November 29, 1993. Under these circumstances, Ms. Dunkin's attorney is not required to pay the sanctions imposed against him by the Tenth Circuit and the District Court; and the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order is a supervening change of law that has rendered moot the orders imposing monetary sanctions against him.

Furthermore, under the Supreme Court's (May 23, 1994) opinion in McKnight, an argument on appeal is frivolous and therefore sanctionable only if made in the face of clearly undisputed circuit precedent. In the present case, since the only basis for the orders

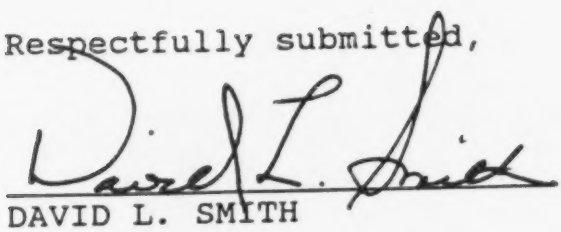
imposing monetary sanctions against Ms. Dunkin's attorney was that his argument in favor of permitting immediate appeal of interlocutory sanctions orders was foreclosed by circuit precedent, and was therefore frivolous, the orders were not proper under McKnight. At the time Ms. Dunkin and her attorney appealed the orders, the Supreme Court had not yet ruled on the issue of whether interlocutory sanctions orders are immediately appealable. Indeed, the Supreme Court has still not ruled on this issue. Filing an appeal was the only way Ms. Dunkin's attorney could preserve this issue pending a possible favorable decision by the Supreme Court. Furthermore, since there was a circuit conflict on the question of whether interlocutory sanctions orders are immediately appealable, with the majority

of circuits permitting such immediate appeal, its answer was not so clear as to make Ms. Dunkin's attorney's position frivolous. Under these circumstances, the orders imposing monetary sanctions against Ms. Dunkin's attorney have been rendered moot by the Supreme Court's (May 23, 1994) opinion in McKnight.

**CONCLUSION**

In conclusion, a writ of mandamus or prohibition would be in aid of the Supreme Court's appellate jurisdiction under 28 U.S.C. § 1254(1). There are present exceptional circumstances warranting the exercise of the Supreme Court's discretionary powers under 28 U.S.C. § 1651(a). Adequate relief cannot be obtained in any other form or from any other court because the Supreme Court has the exclusive authority to direct and supervise its Clerk.

Respectfully submitted,



DAVID L. SMITH

1630 Welton Street, #300
Denver, Colorado 80202
(303) 534-0153

ATTORNEY FOR PETITIONERS

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

---

**IN RE**

**GEANA J. DUNKIN**

**AND**

**DAVID L. SMITH**

---

**APPENDIX TO**
**PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION**

---

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

ATTORNEY FOR PETITIONERS

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No._____

IN THE
**SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1993

---

GEANA J. DUNKIN,
DAVID L. SMITH,

Petitioners,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

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**ORDER ENTERED BY THE SUPREME COURT ON JUNE 20, 1994**

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The motion to direct the Clerk to file a petition for a writ of certiorari is denied.

Supreme Court, U.S.
FILED
SEP 19 1994
OFFICE OF THE CLERK

No. 94-294

In The

# Supreme Court of the United States

October Term, 1994

IN RE
GEANA J. DUNKIN
AND
DAVID L. SMITH

Petition for Writ Of
Mandamus Or Prohibition

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

Submitted by:
CECIL R. HEDGER
GREGORY D. BARTON
HARDING & OGBORN
One Tabor Center
1200 17th Street, Suite 1950
Denver, CO 80202-3357
(303) 629-0300

*Counsel of Record for Respondents Louisiana-Pacific Corporation, James Beldin and Douglas Eddins*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED FOR REVIEW*

1. Whether a petition for writ of mandamus or prohibition may be used in the absence of extraordinary circumstances, for the sole purpose of seeking to require the Clerk of the Supreme Court to engage in the futile act of filing a frivolous application for review by a single Circuit Justice of a previous order entered by the full Court?

2. Whether a party abuses this Court's procedures for seeking an extraordinary writ by attempting to relitigate issues, which have already been rendered the law of the case by this Court's prior rulings, under the guise of seeking a writ of mandamus or prohibition?

---

* Respondents Louisiana-Pacific Corporation, James Beldin and Douglas Eddins respectfully submit a revised statement of the Questions Presented for Review pursuant to S. Ct. R. 15.1 and 24.2 (1994).

## LIST OF PARTIES

The parties to the proceedings below were Petitioners Geana J. Dunkin and David L. Smith, and Respondents Louisiana-Pacific Corporation, James Beldin and Douglas Eddins.

Louisiana-Pacific Corporation does not have a parent company. Louisiana-Pacific Corporation's subsidiaries are Blue Skies Aviation, Inc., Ketchikan Pulp Company, Kirby Forest Industries, Inc., Louisiana-Pacific Corporation (W. Va.), Louisiana-Pacific Corporation de Mexico, S.A. de C.V., Louisiana-Pacific, S.A. de C.V., Louisiana-Pacific Foundation, Louisiana-Pacific International, Inc., Louisiana-Pacific Canada, Ltd., Louisiana-Pacific Trucking Company, Louisiana-Pacific Venture Corp., L-P Foreign Sales Corporation, and New Waverly Transportation, Inc. Louisiana-Pacific Corporation does not have any affiliate companies.

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## STATUTES INVOLVED

Respondents acknowledge the question of whether an extraordinary writ of mandamus or prohibition should issue from this Court arises under the All Writs Act, 28 U.S.C. § 1651, which provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aide of their respective jurisdiction and agreeable to the usages and principles of law.

## STATEMENT OF THE CASE

By Order of February 11, 1993, the United States Court of Appeals for the Tenth Circuit dismissed as premature two companion appeals by Geana J. Dunkin ("Dunkin") and her attorney, David L. Smith ("Smith"). *Dunkin v. Louisiana-Pacific Corp., et al.*, Nos. 92-1230 & 92-1381 (10th Cir. Feb. 11, 1993). The Tenth Circuit also imposed sanctions upon Smith because Smith had filed and pursued two frivolous appeals from separate sanction orders of the United States District Court for the District of Colorado. These interlocutory sanctions orders were not appealable under the clearly established law of the Tenth Circuit. *Id.* Having determined that sanctions should be imposed upon Smith, the Tenth Circuit remanded the case with directions to the District Court to determine in the first instance the proper amount of attorney's fees and costs to be awarded to Appellees. *Id.*

Smith and Dunkin then sought review in this Court, filing their Petition for a Writ of Certiorari on June 15,

1993, asking the Court to review the questions of: (1) whether an interlocutory order sanctioning counsel currently of record is immediately appealable under the collateral order exception to the final judgment rule; and (2) whether sanctions may be imposed against counsel for filing appeals where the clearly established law of the Circuit holds that the interlocutory sanction orders appealed from are not appealable on any basis, until after final judgment. On October 4, 1993, this Court entered the following Order: "Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit *denied.*" *Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 87 (1993) (Case No. 92-1994) (emphasis added).

On May 18, 1994, Smith and Dunkin attempted to file their jurisdictionally defective Petition for Writ of Certiorari, attempting to bypass review in the Tenth Circuit and prematurely seeking review by this Court of a February 17, 1994 Order of the *District Court* which imposed sanctions of immediately payable attorney's fees of $17,506.50 and costs of $579.33 upon Smith pursuant to the Tenth Circuit's February 11, 1993 Order and Mandate in Case Nos. 92-1230 and 92-1381. *See Dunkin v. Louisiana-Pacific Corp.*, Nos. 92-1230 & 92-1381 (10th Cir. Feb. 11, 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 87 (1993). The attempts of Smith and Dunkin to file this premature Petition for Writ of Certiorari of May 18, 1994 have thus far failed, due to the commendable diligence of the Clerk of this Court.

**Course of Proceedings in the District Court**

Following this Court's denial of the Petition for Writ of Certiorari of Smith and Dunkin in Case No. 92-1994, *see Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 87 (1993), a hearing was had before the United States District Court for the District of Colorado, the Honorable Edward W. Nottingham presiding, on the issue of the amount of attorney's fees and costs to be awarded to Appellees as a sanction against Smith, pursuant to the Tenth Circuit's remand order in *Dunkin v. Louisiana-Pacific Corp. et al.*, Nos. 92-1230 & 92-1381 (10th Cir. Feb. 11, 1993). Following the hearing, the District Court imposed immediately payable monetary sanctions against Smith for attorney's fees of $17,506.50 and costs of $579.33, for the costs of defending the frivolous appeals in the Tenth Circuit to Louisiana-Pacific Corp., James Beldin and Douglas Eddins. (Petition for Writ of Mandamus or Prohibition (hereinafter "Petition"), at pp. 28-29.) Also, at the close of the February 17, 1994 hearing, the District Court stayed Dunkin's case "pending resolution of Mr. Smith's status by the Committee on Conduct," but the District Court did not vacate the March 28, 1994 jury trial date for the case.[1] *Id.*

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[1] The District Court's reference to the "status of plaintiff's counsel," referred to the fact that Smith is currently the subject of suspension proceedings before the Committee on Conduct of the District Court, in light of Smith's suspension from practicing before the Tenth Circuit. *See In re Smith*, 10 F.3d 723 (10th Cir. 1993), *cert. pending* (Petition for Writ of Certiorari filed March 31, 1994) (Case No. 93-1547).

On March 4, 1994, the final pretrial conference was held because trial was set to commence March 28, 1994. In light of the continuing uncertainty as to whether Smith was entitled to continue to practice before the District Court, and Smith's continuing failure to pay the sanctions imposed upon him by the District Court and the Tenth Circuit, there was no choice available to the District Court, other than to vacate the March 28, 1994 trial date and stay the proceedings. (Petition, at pp. 29-31.)

**Disposition on Appeal**

Smith and Dunkin have not pursued any appeal to the Tenth Circuit to seek review of the District Court's February 17, 1994 sanction order. Thus, the Tenth Circuit has had no opportunity to consider the issue of whether the *amount* of sanctions imposed upon Smith by the District Court is an appropriate sanction for Smith's filing and pursuit of two frivolous appeals to the Tenth Circuit. *See Dunkin v. Louisiana-Pacific Corp., et al.*, Nos. 92-1230 & 92-1381 (10th Cir. Feb. 11, 1993), *cert. denied* ___ U.S. ___, 114 S. Ct. 87 (1993).

While Dunkin did file a notice of appeal on March 17, 1994, asserting that she was appealing in *pro se* status, Dunkin sought review of only the District Court's *stay* orders of February 17, 1994, and March 4, 1994. Neither Dunkin nor Smith sought review of the District Court's sanction order of February 17, 1994, in the Tenth Circuit. Almost immediately, the Tenth Circuit directed the parties to brief the jurisdictional issue of "whether the [stay] order being appealed is an appealable order." (Petition, at p. 32.) On September 14, 1994, the Tenth Circuit entered

an Order dismissing Dunkin's appeal in Case No. 94-1130 for lack of jurisdiction. (App. at pp. 1-3.)

The attempts of Smith and Dunkin to bypass the Tenth Circuit and prematurely seek review in this Court of the *as yet unreviewed* sanction order of the *District Court* of February 17, 1994, have been unsuccessful, and properly so. The Clerk of this Court originally refused to file the Petition for Writ of Certiorari of May 18, 1994 of Smith and Dunkin, and returned it to Smith. (Petition, at pp. 38-39.) However, Smith and Dunkin, unwilling to accept appellate jurisdictional reality, re-sent this Petition to the Clerk, insisting that it be filed, and the Clerk again refused to file this jurisdictionally-defective Petition for Writ of Certiorari. (Petition, at pp. 39-40.)

Smith and Dunkin then filed in this Court an Application to Direct the Clerk to File Petition for Writ of Certiorari. The full Court disposed of this Application by Order of June 20, 1994, determining that the "motion to direct the Clerk to file a petition for writ of certiorari is denied." *Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (1994).

On July 6, 1994, still unwilling to accept appellate jurisdictional reality, Smith and Dunkin attempted to file an Application for Review of Order Denying Motion to Direct the Clerk to File a Petition for a Writ of Certiorari. (Petition, at p. 41.) The Clerk of this Court properly refused to accept this second Application of Smith and Dunkin. (Petition, at pp. 42-43.) Smith and Dunkin responded by submitting, on July 15, 1994, a third Application, this time seeking an Order to direct the Clerk to

file their Application for Review of Order Denying Motion to Direct the Clerk to File a Petition for a Writ of Certiorari. (Petition, at p. 43.) On July 20, 1994, the Clerk of the Court returned to Smith and Dunkin their latest Application of July 15, 1994. As the Clerk explained to Smith, this "Application to Justice Ginsberg to review the order of the Court entered June 20, 1994 [had to] be returned since an individual Justice has no authority to review an order entered by the full Court." (Petition, at pp. 44-45.)

On August 17, 1994, Smith and Dunkin finally succeeded in cluttering this Court's docket with yet another frivolous pleading, filing at that time their Petition for Writ of Mandamus or Prohibition, seeking an order to direct the Clerk of this Court to file: (1) an Application which seeks review by an individual Justice of an Order of the full Supreme Court; and (2) the very Petition for Writ of Certiorari, the filing of which this Court refused to direct in its June 20, 1994 Order. *See Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (1994).

## ARGUMENT

### 1. The Petition for Writ of Mandamus or Prohibition of Smith and Dunkin Does Not Present Any Exceptional Circumstances Warranting Exercise of the Court's Discretionary Powers and Adequate Relief Can Be Obtained After: (1) the District Court Enters a Final Judgment; and (2) the Tenth Circuit Reviews that Final Judgment.

Pursuant to S. Ct. R. 20.1 (1994), the primary considerations relied upon by this Court in determining whether to grant an extraordinary writ authorized by 28 U.S.C. § 1651(a) are:

> The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion *sparingly exercised*. To justify the granting of any writ under that provision, it must be shown that the writ will be in aide of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

S. Ct. R. 20.1 (1994) (emphasis added).

"It is, of course, well settled, that the writ [of mandamus or prohibition] is not to be used as a substitute for appeal, . . . even though hardship may result from delay." *Schlagenhauf v. Holder*, 379 U.S. 104, 110, 85 S. Ct. 234, 238 (1964) (citations omitted). *See also, In re Sindram*, 498 U.S. 177, 111 S. Ct. 596 (1991) ("*Sindram*"); *Kerr v. United States Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 96 S. Ct. 2119 (1976) (holding that mandamus would be inappropriate

where petitioners had an avenue far short of mandamus to achieve precisely the relief they sought); and *Will v. United States*, 389 U.S. 90, 88 S. Ct. 269 (1967) (Court stating that extraordinary writs "may not be used to thwart the congressional policy against piecemeal appeals" as mandamus does not " 'run the gauntlet of reversible errors' " because "[i]ts office is not to 'control the decision of the trial court' ").

In *Sindram*, this Court considered a petition for an extraordinary writ, which was strikingly similar in its pettifoggery as that which Smith and Dunkin are attempting to perpetrate on this Court. The *Sindram* Court found the petition for an extraordinary writ was abusive and frivolous, reasoning:

> *[T]he granting of an extraordinary writ is, in itself, extraordinary.* . . . On its face, this petition does not even remotely satisfy the requirements for issuance of an extraordinary writ. Petitioner has made no showing that 'adequate relief cannot be had in any other form or from any other court' as required by this Court's Rule 20.1. He identifies no 'drastic' circumstance to justify extraordinary relief. . . . Instead, he merely recites the same claims that he has presented to this Court in over a dozen prior petitions. Petitioner's request that we consider these claims yet again is both frivolous and abusive.
>
> . . . The goal of fairly dispensing justice . . . is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests. *Pro se* petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources because they are not subject to the

> financial considerations – filing fees and attorney's fees – that deter other litigants from filing frivolous petitions. . . . *The risks of abuse are particularly acute with respect to applications for extraordinary relief, since such petitions are not subject to any time limitations and, theoretically, could be filed at any time without limitation.* In order to prevent frivolous petitions for extraordinary relief from unsettling the fair administration of justice, the Court has a duty to deny *in forma pauperis* status to those individuals who have abused the system.

*Sindram*, 498 U.S. at 178-179, 111 S. Ct. at 597-598 (emphasis added) (citations omitted).

Smith and Dunkin have failed to recognize that "the granting of an extraordinary writ is, in itself, extraordinary." *See Sindram*, 498 U.S. at 178, 111 S. Ct. at 597. Like the petition in *Sindram*, "on its face, this petition" of Smith and Dunkin "does not even remotely satisfy the requirements for issuance of an extraordinary writ." *See Id.* Conspicuously absent from the Petition of Smith and Dunkin is any explanation to this Court as to why Smith cannot obtain adequate relief regarding the *District Court's* February 17, 1994 sanction order in the form of review by the Tenth Circuit, following the entry of final judgment in the District Court. Accordingly, because Smith and Dunkin are incapable of making the requisite "showing that 'adequate relief cannot be had in any other form or from any other court' as required by this Court's Rule 20.1," *see Id.*, their Petition for an extraordinary writ should be denied.

**2. The Clerk of this Court Properly Refused to Receive or File the Frivolous Applications of Dunkin and Smith to the Honorable Ruth Bader Ginsberg, Associate Justice of the Supreme Court of the United States, Because Such Applications Improperly Sought Review by a Single Circuit Justice of an Order of the *Full* Court.**

Smith and Dunkin have sought the drastic remedy of an extraordinary writ for the wholly improper purposes of asking this Court to direct the Clerk of this Court to perform a futile act and to improperly reargue the very arguments which this Court rejected when the Court determined that the "motion to direct the Clerk to file a petition for certiorari is denied." *Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (June 20, 1994). Smith and Dunkin claim that the refusal of the Clerk of this Court to receive or file their successive applications directed to Associate Justice Ginsberg is purportedly an "unwarranted" interference with their alleged First Amendment right to access to the Supreme Court.[2] (Petition, at p. 48.) This contention is utterly devoid of merit.

There is no such thing as a "First Amendment right" to access to this Court. "Access" to this Court is controlled by the statutes which define this Court's appellate jurisdiction. *See* 28 U.S.C. § 1254. Smith and Dunkin have

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[2] The argument of Smith and Dunkin in support of their Petition for Writ of Mandamus or Prohibition encompasses a grand total of one and one-half pages of their 52-page Petition and does not contain a single citation to authority. (Petition, at pp. 48 and 52.)

no right, much less a First Amendment right, to constantly harangue this Court and its Clerk with frivolous petitions, motions and applications. The Petition for an extraordinary writ of Smith and Dunkin is a graphic demonstration of the abuse which is "particularly acute with respect to applications for extraordinary relief," which threatens to "unsettl[e] the fair administration of justice" in this Court. *See Sindram*, 498 U.S. at 178, 111 S. Ct. at 597.

It is important to focus on the precise relief which Smith and Dunkin seek in their Petition for an extraordinary writ, that being an order from this Court to direct its Clerk to receive and file an Application directed to a single Justice of this Court, for the purpose of seeking review of an Order of the *full* Court. (Petition, at p. 48.) In *Kimble v. Swackhamer*, 439 U.S. 1385, 99 S. Ct. 51 (1978), Chief Justice Rehnquist entered a decision, as Circuit Justice, in which the Chief Justice refused an application requesting that he "summarily reverse" a judgment of the Supreme Court of Nevada. The Chief Justice reached this conclusion based upon reasoning which is compelling here:

> *It scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to 'summarily reverse' a judgment of the highest court* of a State; a single justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits. . . . Since the likelihood that applicants' claim on the merits would induce four Justices of this Court to note probable jurisdiction on their appeal seems to me very remote, I find it unnecessary to deal

> with their contention that failure on the part of a single justice to grant some sort of interim relief will cause them irreparable injury.

*Kimble*, 439 U.S. at 1385-1386, 99 S. Ct. at 53 (emphasis added) (citations omitted). *See also, Blodgett v. Campbell*, ___ U.S. ___, 113 S. Ct. 1965 (1993) (Justice O'Connor, as Circuit Justice, holding that a single Circuit Justice lacked authority to unilaterally vacate the Ninth Circuit's en banc order remanding a habeas corpus proceeding for an evidentiary hearing).

The reasoning of Chief Justice Rehnquist in *Kimble* conclusively demonstrates the utter frivolity of the pending Petition for an extraordinary writ of Smith and Dunkin. Petitioners are asking this Court to direct the Clerk to engage in the futile act of filing an application for review by a single Circuit Justice of the June 20, 1994 Order of the *full* Court, *see Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (June 20, 1994), even though the law is so clear in this area that it "[i]t scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to 'summarily reverse' a judgment of the highest court of" the United States. *See Kimble*, 439 U.S. at 1385, 99 S. Ct. at 53.

The foregoing discussion shows clearly that there was nothing "unwarranted" about the Clerk's "interference" with the attempts by Smith and Dunkin to waste the time of Associate Justice Ginsberg with an application requesting that she single-handedly reverse the June 20, 1994 Order of the full Court. On the contrary, the Clerk properly ran interference for Associate Justice Ginsberg and this Court. The Clerk's refusal to accept the frivolous application of Smith and Dunkin, which sought reversal

by a single Circuit Justice of an Order of the full Court, was an eminently proper exercise of the Clerk's screening function. Indeed, the Clerk's refusal to accept the Application of Smith and Dunkin to Associate Justice Ginsberg furthered the "goal of fairly dispensing justice, [which] is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests." *See Sindram*, 498 U.S. at 178, 111 S. Ct. at 597.

**3. The Petition for an Extraordinary Writ of Smith and Dunkin, which Asks the Court to Consider Again Claims which the Court has Already Rejected, is Frivolous and Abusive.**

In their Petition, Smith and Dunkin list as their "reasons for granting the [extraordinary] writ" the very same arguments which the *full* Court rejected in determining that the "motion to direct the Clerk to file a petition for writ of certiorari is denied." *Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (June 20, 1994). Thus, like the Petitioner in *Sindram*, Smith and Dunkin identify "no 'drastic' circumstance to justify extraordinary relief." *See Sindram*, 498 U.S. at 178, 111 S. Ct. at 597. "Instead, [they] merely recite[] the same claim[s] that [they have] presented to this Court" multiple times. *See Id. See also, Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 87 (1993); and *Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (1994).

In disregard of this Court's June 20, 1994 Memorandum Decision, Smith and Dunkin have chosen to re-argue

that: (1) the Clerk of this Court "did not have the authority to refuse to receive or file Ms. Dunkin's and her attorney's (May 18, 1994) Petition for a Writ of Certiorari"; and (2) even if the Clerk did have such authority, the case was purportedly in the Tenth Circuit as required by 28 U.S.C. § 1254(1) for two asserted reasons: (A) the District Court was purportedly acting *on behalf of* the Tenth Circuit in entering its sanction order of February 17, 1994; and (B) Dunkin's *pro se* appeal of the District Court's stay orders of February 17, 1994 and March 4, 1994 was pending in the Tenth Circuit. (Petition, at pp. 46-47.) These contentions, which the Court has already rejected in its June 20, 1994 Memorandum Decision, are frivolous in the extreme.

In support of their incredible contention that the District Court was simply acting as some type of alter ego of the Tenth Circuit in determining the amount of sanctions to be imposed upon Smith pursuant to the Tenth Circuit's remand Order and Mandate of February 11, 1993, Smith and Dunkin cite the case of *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987). However, there is no language in the *Braley* decision which purports to transform the district courts of the Tenth Circuit into agents or alter egos of the Tenth Circuit whenever those district courts are directed on remand to determine the amount of sanctions to be imposed upon a litigant or their counsel for pursuing a frivolous appeal. The *Braley* court held only:

> After considering any excuses the attorney offers to justify his or her actions, the court generally will enter a final order rejecting or imposing sanctions and, if imposing, either establish the amount itself or remand to the

> district court for that determination. If fact issues arise from the response, affecting either the amount or whether sanctions should be imposed at all, the appellate court may delegate to the district court the task of resolving those issues.

*Braley*, 832 F.2d at 1515.

Simply because a court of appeals remands to a district court the issue of the amount of attorney's fees and costs to be awarded as a sanction for filing and pursuing an appeal which has found to be frivolous, this does not result in some magic transformation of the district court into an "agent" of the court of appeals. Contrary to the specious contention of Smith and Dunkin, the District Court was not "acting on behalf of the Tenth Circuit" (Petition, at p. 46) when the District Court entered its sanction order of February 17, 1994. Rather, in entering the February 17, 1994 sanction order, the District Court was acting pursuant to the Tenth Circuit's directive on remand that the District Court take the "further action"[3] of determining in the first instance the amount of attorney's fees and costs to be awarded in favor of Louisiana-Pacific Corporation, James Beldin and Douglas Eddins as a sanction for Smith's pursuit of two frivolous, jurisdictionally-defective appeals. *See Dunkin v. Louisiana-Pacific Corp., et al.*, Nos. 92-1230 & 92-1381 (10th Cir. Feb. 11, 1993).

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[3] It is elementary that the term "remand" means the "sending by the appellate court of the cause back to the same court out of which it came, for purposes of having some further action taken on it there." BLACK'S LAW DICTIONARY 1162 (5th ed. 1979).

No doubt Smith and Dunkin concocted this absurd contention that the District Court was "acting on behalf of the Tenth Circuit" in entering the sanction order of February 17, 1994, because it is the only way, albeit a wholly improper one, for Smith and Dunkin to attempt to seek immediate review of the District Court's February 17, 1994 sanction order. Smith and Dunkin have been told in no uncertain terms by the Tenth Circuit that interlocutory district court orders sanctioning counsel currently or record are not immediately appealable, with review of such sanction orders being deferred until an appeal following the entry of a final judgment on the merits. *See Id.*

Smith and Dunkin thus knew that if they filed an appeal to the Tenth Circuit from the District Court's February 17, 1994 sanction order, they would run a substantial risk of being further sanctioned for pursuing yet another frivolous, jurisdictionally-defective appeal. Rather than facing this prospect, Smith and Dunkin have attempted to completely bypass the Tenth Circuit by improperly seeking immediate review by this Court of an interlocutory district court order sanctioning counsel currently of record, even though it is clear as a matter of law that this Court has no jurisdiction to review the District Court's interlocutory sanction order of February 17, 1994, which has not been reviewed by the Tenth Circuit.

The second contention of Smith and Dunkin in support of their erroneous claim that the case is actually "in the United States Court of Appeals" for the Tenth Circuit (Petition, at p. 47) again shows conclusively why this Court does not have jurisdiction and, therefore, why this Court has already properly determined that the "motion to direct the Clerk to file a petition for writ of certiorari is

denied." *Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 2702 (1994). Smith and Dunkin claim that this case is actually in the Tenth Circuit by virtue of Dunkin's alleged *pro se* appeal to the Tenth Circuit of the District Court's interlocutory, nonappealable stay orders of February 17, 1994 and March 4, 1994. This interlocutory appeal by Dunkin has recently been dismissed for lack of appellate jurisdiction in the Tenth Circuit. (App. at pp. 1-3.) Thus, Dunkin's appeal of the District Court's stay orders is no longer in the Tenth Circuit.

Moreover, Smith and Dunkin never provided this Court with any explanation as to how Dunkin's appeal of two *stay* orders could possibly have placed before the Tenth Circuit the District Court's *sanction* order of February 17, 1994. Dunkin and Smith have no explanation because neither Dunkin, nor Smith acting as her counsel in the Tenth Circuit in violation of the November 29, 1993 order suspending him from practicing in the Tenth Circuit, *see In re Smith*, 10 F.2d 723 (10th Cir. 1993), sought review in the Tenth Circuit of the District Court's February 17, 1994 sanction order. Accordingly, there is absolutely no basis upon which Smith and Dunkin can invoke this Court's discretionary jurisdiction under 28 U.S.C. § 1254.

Although nothing Smith and Dunkin attempt in this case should surprise Respondents by now, the contention of Smith and Dunkin at page 47 of their Petition that this is not a case where they have filed consecutive petitions for a writ of certiorari in violation of S. Ct. R. 44.4, is nothing short of ludicrous. The vast bulk of the Petition of Dunkin and Smith is devoted to challenges to: (1) the

District Court's multiple orders properly imposing monetary sanctions upon Smith; (2) the Tenth Circuit's determination that two earlier jurisdictionally-defective appeals of Smith and Dunkin were frivolous; (3) the Tenth Circuit's determination that sanctions should be imposed upon Smith for filing and pursuing those two frivolous appeals; and (4) the disciplinary order suspending Smith from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit or the District Court are paid, *see In re Smith*, 10 F.3d 723 (10th Cir. 1993),[4] which suspension order was the result of a separate and independent proceeding in the Tenth Circuit and as to which Smith has already filed a Petition for Writ of Certiorari in this Court (Case No. 93-1547). Therefore, this clearly is a case where consecutive petitions for writ of certiorari have been filed by Dunkin and Smith in violation of this Court's Rule 44.4.

Further, while Smith and Dunkin acknowledge that this Court previously denied, by Order of October 4, 1993, their Petition for Writ of Certiorari of June 15, 1993, Smith and Dunkin are either incapable of or too stubborn

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[4] With respect to the Tenth Circuit's suspension order, Smith and Dunkin take the incredible position in this separate proceeding, directly contrary to the sanction orders against Smith, that he "is not required to pay the sanctions imposed against him by the Tenth Circuit and the District Court if he exercises his 'option' of remaining suspended [and] he has been forced to exercise his 'option' of remaining suspended from the practice of law in the Tenth Circuit since November 29, 1993." (Petition, at pp. 49-50.) Even if Smith truly is exercising his "option" to remain suspended before the Tenth Circuit, this would not relieve Smith of his obligation to pay all sanctions imposed upon him by the District Court and the Tenth Circuit.

to recognize the legal effect of this Court's denial of their earlier Petition for Writ of Certiorari. In that earlier proceeding, Smith and Dunkin sought review in this Court of the Tenth Circuit's Order of February 11, 1993 in *Dunkin v. Louisiana-Pacific Corp., et al.*, Nos. 92-1230 & 92-1381, directly challenging the Tenth Circuit's determinations that: (1) their two jurisdictionally-defective appeals were frivolous; and (2) sanctions should be imposed upon Smith for filing and pursuing such frivolous appeals. This Court's denial of the June 15, 1993 Petition for Writ of Certiorari of Dunkin and Smith, *see Dunkin and Smith v. Louisiana-Pacific Corp., et al.*, ___ U.S. ___, 114 S. Ct. 87 (1993), made the legal conclusions in the Tenth Circuit's February 11, 1993 Order "final and law of the case, and [Smith and Dunkin are] barred from attempting to relitigate them."[5] *Constant v. United States*, 929 F.2d 654, 657 (Fed. Cir. 1991). Clearly, the request of Smith and Dunkin

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[5] The fact that the Tenth Circuit's determinations that the two prior appeals by Dunkin and Smith were frivolous and that Smith should be sanctioned therefor are the law of this case fully disposes of the meritless contention of Dunkin and Smith that this Court's decision in the separate and distinct case of *McKnight v. General Motors Corp.*, ___ U.S. ___, 114 S. Ct. 1826 (1994) (sanction order by the United States Court of Appeals for the Seventh Circuit) somehow, apparently retroactively according to Smith and Dunkin, "rendered moot" the Tenth Circuit's decision in *Dunkin v. Louisiana-Pacific Corp., et al.*, Nos. 92-1230 & 92-1381 (10th Cir. Feb. 11, 1993). The *McKnight* Court did not purport to lay down an across-the-board rule governing when an appeal will be deemed frivolous and, therefore, sanctionable, nor did the *McKnight* Court give any indication that its decision was meant to be given retroactive effect or that such decision was intended to have any effect on the venerable law of the case doctrine.

that this Court "consider these claims yet again is both frivolous and abusive." *See Sindram*, 498 U. S. at 178, 111 S. Ct. at 597.

The August 15, 1994 request of Smith and Dunkin unequivocally demonstrates that they "have a greater capacity than most to disrupt the fair allocation of [the] judicial resources" of this Court. *See Id.* "In order to prevent [further] frivolous petitions for extraordinary relief" from Dunkin and Smith "from unsettling the fair administration of justice," *see Id.*, the Court would be fully justified in *sua sponte* imposing sanctions of "just damages and single or double costs" on Smith and Dunkin, pursuant to S. Ct. R. 42.2, and in directing the Clerk not to accept any further "Applications" or petitions for extraordinary writs pursuant to 28 U.S.C. § 1651(a), unless Smith and Dunkin first ask for and receive leave from the Court to make such a filing.

## CONCLUSION

For all of the foregoing reasons, Respondents Louisiana-Pacific Corp., James Beldin and Douglas Eddins respectfully request that this Court enter an Order denying the Petition for Writ of Mandamus or Prohibition of Smith and Dunkin.

Respectfully submitted,

Louisiana-Pacific Corporation,
James Beldin and Douglas
Eddins, Respondents

By: Cecil R. Hedger
Gregory D. Barton
Harding & Ogborn
One Tabor Center
1200 Seventeenth Street
Suite 1950
Denver, CO 80202-3357
(303) 629-0300

*Counsel of Record for Respondents Louisiana-Pacific Corp., James Beldin and Douglas Eddins*

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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|---|---|
| GEANA J. DUNKIN,<br>Plaintiff-Appellant,<br>v.<br>LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DOUGLAS EDDINS,<br>Defendants-Appellees. | No. 94-1130 |

ORDER

(Filed Sept. 14, 1994)

Before LOGAN, ANDERSON, and KELLY, Circuit Judges.

This appeal is jurisdictionally defective because the order being appealed is not final. *See* 28 U.S.C. § 1291.

This is an appeal from an order of the district court staying the proceedings below until the status of plaintiff's counsel's right to practice before the district court is clarified.

A final decision is a decision that "ends the litigations on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). "A stay is not ordinarily a final decision for purposes of § 1291, since most stays do not put the plaintiff 'effectively out of court.' " *Moses H. Cone*

*Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 10 n. 11 (1983); *See also Pioneer Properties, Inc. v. Martin*, 776 F.2d 888, 890-891 (10th Cir. 1985).

The appellant appears to argue that the order is an injunction, and thus appealable under 28 U.S.C. § 1292(a)(1). This argument is without merit. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988) ("An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)"). *See also Hamilton v. Robertson*, 854 F.2d 740, 741 (5th Cir. 1988). (There is "a clean distinction between injunctions prohibiting proceedings in other courts, which are appealable, and orders, whether or not styled 'injunctions,' that control proceedings only in the court that issues the order. The latter are not appealable[.]").

The appellees' Motion to strike Opening Brief for Plaintiff/Appellant and Appellant's Appendix and for Sanctions is denied in part, granted in part and referred in part. The request to strike the appellant's brief is denied. The request to strike the appellant's appendix is granted. *See* 10th Cir. R. 10.2.2. ("In pro se appeals . . . the clerk of the district court shall transmit the record to the clerk of the court of appeals . . . "). The request for sanctions is referred to the disciplinary panel.

The appeals' motion to file an appendix is denied. The appellees' Motion for Leave to File Supplemental

Appendix is denied without prejudice to being renewed before the disciplinary panel.

APPEAL DISMISSED.

Entered for the Court
PATRICK FISHER
Chief Deputy Clerk
By: /s/ Ellen Rich Reiter
Ellen Rich Reiter
Deputy Clerk/Appeals
Expediter